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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MARTIN JIAIS REQUENA, Defendant and Appellant.	G041350 (Super. Ct. Nos. 07NF1477 & 08NF1393) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, John S. Adams, Judge. Affirmed.

Melissa Hill, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

We appointed counsel to represent Martin Jiais Requena on appeal. Counsel filed a brief that provided the facts of the case. Counsel did not argue against her client but advised the court no issues were found to argue on his behalf. We invited Requena to file a supplemental brief, which he did. We have considered the issues suggested by appellant's counsel, considered Requena's supplemental letter brief, and independently examined the record. We found no arguable issues and affirm the judgment. (*People v. Wende* (1979) 25 Cal.3d 436 (*Wende*).)

* * *

Pursuant to *Anders v. State of California* (1967) 386 U.S. 738 (*Anders*), Requena's appellate counsel suggests numerous questions: (1) Was Requena properly advised of his constitutional rights and the direct consequences of his guilty plea, and did he voluntarily waive his rights? (2) Did the trial court erroneously rule he had not established legal grounds to appoint new counsel to represent him in bringing a motion to vacate the judgment and/or to set aside the guilty plea? and (3) Did the trial court erroneously rule he had failed to establish legal grounds to vacate his guilty plea and set aside his sentence? In his supplemental letter brief, Requena argues an attempted burglary is not a "strikeable felony," and the "Three Strikes" law was misused.

FACTS

In July 2008, an amended information charged Requena with two counts of attempted first degree residential burglary (Pen. Code, §§ 664, 459) (counts 1 and 2).[1] As to count 1, the information alleged a person other than an accomplice was present during the commission of the attempted residential burglary. (§ 667.5, subd. (c)(21).) The information also alleged Requena suffered a prior serious felony within the meaning of

[1] All further statutory references are to the Penal Code, unless otherwise indicated.

the Three Strikes law (§§ 667, subds. (a)(1), (d), (e)(1); 1170.12, subds. (b), (c)(1)), and he served a prior prison term (§ 667.5, subd. (b)).

In November 2008, the prosecutor filed a motion seeking to admit prior acts under Evidence Code section 1101, subdivision (b). The court ruled the prosecution could introduce evidence of two prior instances of misdemeanor conduct but not the convictions to show absence of mistake, accident, intent, preparation, and opportunity. A few days later, Requena appeared with counsel and counsel advised the court Requena desired to change his previously entered plea of not guilty. The court asked Requena if it was true that he wanted to change his plea. Requena answered, "That is correct."

The trial court advised Requena that to change his plea he would need to understand and waive the constitutional right to a speedy and public trial; the right to testify in his own defense; the right to remain silent; the right to subpoena witnesses and evidence; the right to confront and cross-examine witnesses who may testify against him; and the right to present evidence on his own behalf. When asked if he understood those rights, Requena answered, "I clearly understand them." The court inquired if Requena understood that if he were to plead guilty, he would be giving up and waiving all those rights and referenced all the rights that were set forth in the waiver form that was before the court.[2] Requena acknowledged the form and again advised the court he understood what the court had just told him. The court then asked Requena if he had discussed the case with his attorney and Requena answered, "Absolutely." The court specifically asked Requena if he understood the risk of deportation involved in pleading guilty, and Requena said he understood. The court asked him if he understood the maximum sentence that could be imposed was 13 years and 4 months. Requena responded, "Yes, I understand that." Regarding the plea agreement, the court asked if Requena, with the aid

[2] We take judicial notice of the *Boykin/Tahl* form (*Boykin v. Alabama* (1969) 395 U.S. 238; *In re Tahl* (1969) 1 Cal.3d 122), in the superior court file. (Evid. Code, §§ 452, subd. (d), 459, subd. (a); *People v. Foster* (1988) 201 Cal.App.3d 20, 24, fn. 1.)

and benefit of his lawyer, had read everything on the form. Requena answered, "I did read it and understood it, yes." The court then inquired into the voluntariness of the plea and waivers. Requena indicated he was pleading guilty freely and voluntarily and denied any promises having been made to him to persuade him to plead guilty. Requena acknowledged all the initials on the form were his and that the signature at the bottom of the page was his. The court asked if the factual basis for the plea that appeared on the form was correct, and Requena said it was a true statement. The court found the waiver of rights was knowing, voluntary, and intelligent and that a factual basis existed for the plea. Counsel joined in the plea, the waivers, and the factual basis. Requena waived time for sentencing and the preparation of a formal sentencing report but asked to address the court before it imposed sentence.

In addressing the court, Requena stated, "After that paperwork came to light the very last minute, I have no choice but to plead guilty." The paperwork to which Requena referred related to the Evidence Code 1101, subdivision (b). He proclaimed his innocence and stated he felt the prosecution should give him the opportunity to accept a previous offer of five years. He complained the prosecution waited until the last minute to pursue introducing evidence of his priors. In terms of the proposed seven-year sentence, Requena stated he had a family that needed him and again expressed his dissatisfaction the prosecutor had revoked her more lenient offer.

Following Requena's comments, his counsel addressed the court. He expressed appreciation to the court for its offer to Requena and urged the court to further reduce his sentence by striking the prior for purpose of sentencing on count 1 as well. After Requena's statements to the court, the prosecutor indicated her opposition to the court's offer to strike Requena's violent felony for the purpose of sentencing, indicating it was a very recent offense. She indicated Requena was well aware of his criminal history and had ample time to accept her previous offer before the prosecution learned more about his background and revoked the offer. Lastly, the prosecutor expressed concern

Requena's comments to the court could be viewed as an indication he had been coerced into pleading guilty, and asked the court to clarify the record.

The trial court again asked Requena if his plea was a knowing and voluntary guilty plea. Requena responded, "Yes, your honor." Further colloquy between the court and Requena ensued with Requena repeatedly indicating he was pleading guilty voluntarily. The court imposed a sentence of seven years consisting of a double the low-base term of two years on count 1, a concurrent term of one year on count 2, and a consecutive five-year term for the prior serious felony enhancement. The court struck the prior prison term enhancement and the prior "strike" allegation. The court also sentenced Requena to a concurrent five-year sentence for a violation of probation on case No. 07NF1477.

On December 4, 2008, Requena appeared in court with his counsel and for a hearing on a *Marsden* motion.[3] At the hearing, the trial court allowed Requena an opportunity to explain why he believed his attorney should be relieved and allowed Requena's attorney to respond. While addressing the court, Requena also stated he wanted to withdraw his guilty plea. At the conclusion of the hearing, the court found good cause did not exist to relieve Requena's counsel and there was no basis to allow Requena to withdraw his plea.

Requena attempted to secure a certificate of probable cause, but his request was denied. He subsequently filed a timely notice of appeal.

DISCUSSION

We first address the issues suggested by appellant's counsel and will next address the issues raised by Requena in his supplemental letter brief.

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[3] The courtroom was closed during the *People v. Marsden* (1970) 2 Cal.3d 120, motion hearing and the transcript was filed under seal.

Appellate Counsel

Appellate counsel suggests this court review Requena's guilty plea to determine whether he was properly advised of his rights and the consequences of his plea, and whether he voluntarily waived those rights. We conclude there was no error.

A defendant cannot challenge the validity of his plea on appeal unless he has obtained a certificate of probable cause. (§ 1237.5; *People v. Mendez* (1999) 19 Cal.4th 1084, 1095.) A defendant who pleads guilty in exchange for a specific sentence and receives the benefit of the bargain, as Requena did, is estopped from later complaining about the sentence he received as a result of the plea agreement. (*People v. Hester* (2000) 22 Cal.4th 290, 295.) Nonetheless, we will briefly address the merits.

In determining whether a defendant's plea was voluntary and intelligent, we review the totality of circumstances. (*People v. Howard* (1992) 1 Cal.4th 1132, 1175.) The record reflects the trial court engaged in lengthy discussions with Requena before it accepted his plea. These discussions occurred before Requena addressed the court and after. In each instance, Requena repeatedly assured the court he understood his rights, wished to waive those rights, wanted to enter a plea of guilty, and accept the court's offer regarding a seven-year sentence. Requena's counsel joined in the plea and waivers. Based on the totality of the circumstances, we find the plea was voluntary and intelligent.

In ruling Requena had not established legal grounds to have his counsel relieved and new counsel appointed, appellate counsel questions whether the court erred. We review the denial of a *Marsden* motion for abuse of discretion. (*People v. Bills* (1995) 38 Cal.App.4th 953, 961 (*Bills*).) The "defendant bears a very heavy burden to prevail on [a *Marsden*] motion." (*Ibid*.) To prevail on such a motion, a defendant must "clearly show[] that the first appointed attorney is not providing adequate representation [citation] or that defendant and counsel have become embroiled in such an irreconcilable

conflict that ineffective representation is likely to result [citation]." (*People v. Barnett* (1998) 17 Cal.4th 1044, 1085, internal quotations omitted (*Barnett*).) The burden for obtaining appointment of substitute counsel, as expressed in *Marsden*, applies equally to motions made preconviction and postconviction. There is no greater right to counsel or lesser burden of proof after conviction. (*Barnett, supra*, 17 Cal.4th 1044.)

We have reviewed the sealed record of the *Marsden* hearing and find no abuse of discretion. The trial court properly denied the *Marsden* motion.

The last question raised by appellant's counsel is whether the trial court erred in ruling Requena failed to establish legal grounds to vacate his guilty pleas and set aside his sentence. A trial court may permit a defendant to withdraw a guilty plea "for a good cause shown . . . ." (§ 1018.) "It is the defendant's burden to produce evidence of good cause by clear and convincing evidence. [Citation.]" (*People v. Wharton* (1991) 53 Cal.3d 522, 585.) When a defendant is fully advised of the consequences of the plea, the defendant's hope for more lenient treatment or subsequent change of mind does not provide grounds for withdrawal. (*People v. Nance* (1991) 1 Cal.App.4th 1453, 1456-1457.) "A decision to deny a motion to withdraw a guilty plea '"rests in the sound discretion of the trial court"' and is final unless the defendant can show a clear abuse of that discretion. [citations.]" (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1254.)

We have reviewed the sealed record as it pertains to Requena's desire to withdraw his guilty plea. Nothing in the record supports any valid legal basis for allowing Requena to withdraw his plea. We find the trial court properly denied Requena's request to withdraw his plea.

Requena's Contentions

Requena argues although the Penal Code provides any first degree burglary is a "serious" felony, the "California [Penal Code] does not list an 'attempted' burglary of any kind as a strikeable felony." He misreads the statute.

Attempted first degree burglary constitutes a "serious felony" and a strike under California sentencing law (§§ 667, subd. (d)(1), 1192.7, subd. (c)(18), (39)). In pertinent part the statute provides: "As used in this section, 'serious felony' means any of the following: [¶] (18) any burglary of the first degree; [¶] . . . [¶] (39) any attempt to commit a crime listed in this subdivision other than an assault . . . ." (§ 1192.7, subd. (c)(18), (39).) Simply stated, an attempt to commit a burglary of the first degree is an attempt to commit a crime listed.

Next, Requena contends the "Three Strikes law has been misused in this case." He contends the Three Strikes law "is designated appropriately to be applied to violent and serious felony crimes." He is mistaken. The Three Strikes law applies not only to violent felonies, but it also applies to serious felonies within the meaning of the Three Strikes law. (§ 667, subd. (d)(1).) It is well established enhanced punishment for nonviolent recidivists is not unconstitutional. (*Rummel v. Estelle* (1980) 445 U.S. 263, 275, 284-285.)

"The purpose of [the Three Strikes law] is to deter and punish recidivism by making repeat offenders serve longer sentences. [Citation.]" (*People v. Williams* (1996) 49 Cal.App.4th 1632, 1638.) Requena is a recidivist within the meaning of the law. In November 2005, he was convicted and served a prison term for a violation of Health and Safety Code section 11377, subdivision (a). Just two years later in July 2007, he was convicted of second degree robbery. While still on probation in that case, Requena committed the instant offenses. It is clear from the record the court struggled with its sentencing decision. After considerable thought the court, over prosecution objection, sentenced Requena to only a seven-year sentence on the new offenses and imposed a concurrent sentence on the probation violation. We find no sentencing error.

DISPOSITION

A review of the record pursuant to *Wende, supra*, 25 Cal.3d 436, and *Anders, supra,* 386 U.S. 738, including the possible issues raised by appellate counsel and the Requena's supplemental brief, has disclosed no reasonably arguable appellate issue. Requena has been adequately represented by counsel on this appeal. The judgment is affirmed in all respects.

O'LEARY, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

MOORE, J.